

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEW MEXICO**

**UNITED STATES OF AMERICA,**

**Plaintiff,**

**v.**

**No. CR 12-02677 JCH**

**RICARDO GUTIERREZ-LOPEZ,**

**Defendant.**

**MEMORANDUM OPINION AND ORDER**

This matter is before the Court on Defendant's *Motion To Obtain Authorization from the United States District Court To Submit an Out of Time Notice of Appeal*. [Doc. 77 (filed 9/19/14)] Having considered the motion, the case file, and relevant law, the Court concludes that the Motion should be denied.

**BACKGROUND**

Defendant was indicted on Conspiracy with intent to distribute 100 grams and more of a mixture and substance containing a detectable amount of heroin (Count 1), and Possession with intent to distribute 100 grams and more of a mixture and substance containing a detectable amount of heroin (Count 2). [Doc. 15] Defendant pleaded guilty to both counts. [Doc. 61] In the written plea agreement, Defendant expressly waived the right to appeal his conviction and any sentence within or below the applicable advisory guideline range. [Doc. 61, p. 8] Defendant was sentenced to 80 months. [Doc. 67] The applicable guideline range was 87 – 108 months according to the PSR. [Doc. 65, p. 2]

The judgment of conviction was entered on September 16, 2013. [Doc. 67] The Federal Rules required the notice of appeal to be filed within fourteen days. *See* Fed. R. App. P. 4(b)(1)(A)(i). The filing deadline was September 30, 2013.

Defendant filed a notice of appeal in the Tenth Circuit on July 14, 2014. [Doc. 77, pp. 13, 6] The Tenth Circuit redirected the notice of appeal to this Court. [Doc. 73, p. 3] This Court provided the preliminary record to the Tenth Circuit, which then, on July 23, 2014, entered an order dismissing the appeal as untimely. [Doc. 76]

### **DISCUSSION**

Although Defendant's notice of appeal was filed in the Tenth Circuit instead of in the district court, this error did not affect the Tenth Circuit's disposition of the appeal; the Tenth Circuit treated the notice as if it had been filed in the correct court, taking the date of filing as July 14, 2014. [Doc. 76] *See* Fed. R. App. P. 4(d). Concluding that the notice of appeal was filed more than nine months after the filing deadline, the Tenth Circuit concluded that "inordinate" delay supported sua sponte dismissal of Defendant's appeal. [Doc. 76]

Almost two months after that dismissal, Defendant filed his pro se Motion in this Court requesting authorization to file an out-of-time notice of appeal. [Doc. 77] The Federal Rules authorize this Court to extend the time to file a notice of appeal for a maximum of thirty days "from the expiration of the time otherwise prescribed." Fed. R. App. P. 4(b)(4). As stated above, the "time otherwise prescribed" is on or before September 30, 2013. This Court has no authority under Rule 4(b)(4) to extend the deadline past October 30, 2013. Even if there were no other reasons for the Court to deny Defendant's Motion, the Court is not authorized to grant an extension that would be of any aid to Defendant at this time.

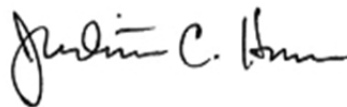
The Court recognizes that Defendant received a July 2, 2014 letter from the Tenth Circuit Clerk's Office, responding to Defendant's request for information about time limits for appeal and advising Defendant that if he felt he had a valid basis on which to file a timely appeal, he should file a notice of appeal in district court. [Doc. 77, p. 14] This letter did not, however, advise that there was such a basis or that an appeal would be allowed. Since the date of that letter, the Tenth Circuit dismissed Defendant's appeal as untimely. This Court lacks authority to allow a contrary result.

In addition, the Court notes that Defendant agreed in his plea agreement not to appeal his conviction or his sentence, provided the sentence was within or below the advisory guideline range (as it was). [Doc. 61, p. 8]

### **CONCLUSION**

The Court concludes that it has no authority to allow Defendant to file an out-of-time notice of appeal, as requested in Defendant's motion. For all of the reasons discussed above, Defendant's Motion will be denied.

**IT IS THEREFORE ORDERED THAT** Defendant's *Motion To Obtain Authorization from the United States District Court To Submit an Out of Time Notice of Appeal* [Doc. 77] is **DENIED.**



---

**UNITED STATES DISTRICT JUDGE**